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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 HABIBO A. JAMA,)
12) CASE NO. C09-256 RSM
13 Plaintiff,)
14 v.) ORDER GRANTING PLAINTIFF'S
15 UNITED STATES OF AMERICA, *et al.*,) MOTION FOR LEAVE TO FILE SECOND
16 Defendants.) AMENDED COMPLAINT
17)
18)

19 **I. INTRODUCTION**

20 This matter comes before the Court on Plaintiff's "Motion for Leave to File Second
21 Amended Complaint" (Dkt. #47). Plaintiff is suing seven federal and state officers as well as
22 two municipalities and the United States for constitutional violations arising from a search of
23 her residence. Plaintiff wishes to correct a typographical omission of one individual federal
24 defendant from the claims section of her Amended Complaint, add additional facts regarding
25 this defendant's actions, add an additional cause of action against two individual federal
26 defendants, and make other minor changes. The individual federal defendants object on the
27 grounds that they would be prejudiced by an amendment of the complaint and that the
28 proposed amendment would be futile.

1 For the reasons set forth below, the Court agrees with Plaintiff, and GRANTS
2 Plaintiff's motion.

3 **II. DISCUSSION**

4 **A. Background**

5 On July 20, 2006, a federal grand jury indicted 18 people for conspiracy to import and
6 distribute khat¹ in the wake of a Drug Enforcement Agency ("DEA") investigation called
7 "Operation Somali Express." Abdigafar Ali Hassan, Plaintiff's uncle who "occasionally
8 stayed" at Plaintiff's house, was one of those indicted. His allegedly criminal activity
9 provided the basis for a search warrant for Plaintiff's residence, which issued on July 24,
10 2006. DEA agents and municipal officers executed the warrant on July 26, 2006. Plaintiff
11 filed this action alleging that her constitutional rights were violated in that search.

12 According to the Amended Complaint, officers broke into Plaintiff's residence with a
13 battering ram without waiting an appreciable time after knocking and announcing their
14 presence, if in fact they did at all. They proceeded into the room with guns drawn and
15 arrested three male occupants, Plaintiff's relatives. They forced Plaintiff down the stairs,
16 threw her onto the floor injuring her shoulder, and handcuffed her. Plaintiff was wearing
17 only a nightshirt. Being a devout Muslim woman whose religion required her to wear a head
18 scarf, and wearing only a nightshirt,² Plaintiff felt naked in front of men who were not her
19 relatives without appropriate clothing and head covering. She asked the officers to allow her
20 to retrieve appropriate clothing and explained to them that her religion required her to be
21 properly dressed in opaque clothing with her head covered in the presence of men who are
22 not her relatives, but they refused. An officer took photographs of Plaintiff in her nightshirt,
23 without the clothing required by her religious beliefs. Plaintiff alleges that the search violated
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26 ¹ Khat is the common name for Catha Edulis, a leafy herb used in the Horn of
27 Africa and lower Arabian Peninsula. It is consumed by chewing. Freshly
28 picked khat contains cathinone and cathine, controlled substances under U.S.
law. After 48-72 hours, the cathinone often breaks down into cathine.

² The Amended Complaint refers to Plaintiff's clothing alternatively as a
"nightshirt" or "sheer night gown."

1 her fourth amendment rights and the officers' refusal to allow her to retrieve proper clothing
2 violated her first amendment right to free exercise of religion.

3 The Amended Complaint makes allegations against three DEA defendants, Special
4 Agent ("SA") Brooks, SA Smith, and Task Force Officer Hackett (collectively the
5 "Individual Federal Defendants"). It alleges that SA Brooks planned the raid of Plaintiff's
6 residence and filed the affidavit to obtain the search warrant. It also alleges that SA Brooks,
7 negligently, recklessly, or intentionally violated the federal knock and announce rule.
8 However, while Plaintiff made Bivens claims against SA Smith and TFO Hackett, SA Brooks
9 was accidentally omitted from the claims section of the Amended Complaint, so no claim was
10 stated against him. Plaintiff first noticed this error when the Individual Federal Defendants
11 filed a motion to dismiss.

12 With regard to SA Smith and TFO Hackett, the Amended Complaint alleges that they
13 participated in the search and refused to allow Plaintiff to put on appropriate clothing despite
14 her persistent requests. It alleges that TFO Hackett took photographs of Plaintiff in her
15 nightgown. Count One alleges that TFO Hackett and SA Smith, "in their capacities as actors
16 and supervisors," violated Plaintiff's fourth amendment rights and free exercise rights.

17 The Individual Federal Defendants filed a motion to dismiss and for summary
18 judgment. Along with her response, Plaintiff filed this Motion for Leave to File a Second
19 Amended Complaint. Plaintiff proposes two major changes and a few minor ones. One
20 minor change was that Plaintiff changed the Complaint to indicate that SA Smith rather than
21 TFO Hackett was the one who took pictures of Plaintiff.

22 The first major change relates to SA Brooks. First, Plaintiff's Proposed Second
23 Amended Complaint seeks to add SA Brooks to Count One, alleging that he violated
24 Plaintiff's Fourth Amendment rights. Plaintiff states that SA Brooks' omission in the
25 Amended Complaint was a typographical error. Second, Plaintiff wishes to delete SA
26 Brooks' name from a sentence stating: "SA Brooks, SA Smith, TFO Hackett, and other
27 officers involved in planning and executing the July 26, 2008 warrant on the Roxbury
28 residence, negligently, recklessly, or intentionally violated [the federal knock and announce

rule].” This is because Plaintiff subsequently learned that SA Brooks was not present during the search. Defendants do not object to this change. Third, Plaintiff seeks to add a sentence stating that the warrant affidavit that SA Brooks submitted to the magistrate judge was deficient in probable cause and omitted relevant information.

The second major change relates only to SA Smith and TFO Hackett. Plaintiff alleged in the Amended Complaint that these defendants violated her First Amendment rights to free exercise of religion. In the Second Amended Complaint, Plaintiff seeks to add that SA Smith and TFO Hackett also violated the Religious Freedom Restoration Act (“RFRA”).

B. Legal Analysis

The Court should “freely give” leave to amend a complaint “when justice so requires.” Fed. R. Civ. Proc. 15(a). The Ninth Circuit has dictated that this rule is to be interpreted with “extreme liberality.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (quoting *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). The Court may deny a motion for leave to amend for reasons such as bad faith, undue delay, repeated failure to cure deficiencies in the complaint through previous amendments, undue prejudice to the party opposing amendment, and futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Jackson*, 902 F.2d at 1387. Prejudice to the opposing party is the most important factor, *Jackson*, 902 F.2d at 1387, but “futility of an amendment alone can justify the denial of a motion.” *Ahlmeier v. Nevada System of Higher Education*, 555 F.3d 1051, 1055 (9th Cir. 2009). “Absent prejudice or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.” *Eminence Capital v. Aspeon*, 316 F.3d 1048, 1052 (9th Cir. 2003).

The Individual Federal Defendants first argue that leave should not be granted because they would suffer undue prejudice. They note that they have already filed a Motion to Dismiss and Motion for Summary Judgment which they would have to withdraw and refile with added arguments addressing Plaintiff’s new claims. This does not amount to substantial prejudice sufficient to overcome the presumption in favor of granting leave to amend. Defendants will

1 still be able to bring dispositive motions regarding the new Second Amended Complaint. Their
2 opportunity for discovery is not hampered in any way. Nor is this amendment occurring on the
3 eve of trial. Additionally, the large majority of the arguments pertaining to dismissal of claims
4 in the Amended Complaint carry over to the Second Amended Complaint. Any prejudice the
5 Individual Federal Defendants will suffer is small.

6 It is true, at least in the case of Plaintiff's new RFRA claims, that Plaintiff could have
7 brought these claims much sooner, in the original Complaint or in the Amended Complaint.
8 The facts forming the basis of the RFRA claim are exactly the same facts supporting Plaintiff's
9 free exercise claim. Thus, Defendants argue that this Court should not allow the amendment
10 on the grounds that Plaintiff unjustifiably delayed in making this claim. However, there is no
11 allegation that Plaintiff is acting in bad faith. Furthermore, the Individual Federal Defendants
12 will not be prejudiced by this amendment precisely because the underlying facts are exactly the
13 same as an already existing claim; the free exercise claim and the RFRA claim go hand in
14 hand.

15 Additionally, the Individual Federal Defendants argue that Plaintiff's amendments are
16 futile. According to them, the "new claim"³ regarding SA Brooks based on his filing of a
17 warrant affidavit that purportedly lacked probable cause and omitted relevant information, is
18 time barred because the three-year statute of limitations for *Bivens* claims has run.
19 Furthermore, they argue that Plaintiff cannot make a "substantial showing" that SA Brooks
20 acted intentionally or recklessly in omitting facts in his affidavit and cannot establish that the
21 warrant would not have issued without the omission, the two elements required for this claim
22 to succeed. Finally, they argue that the added RFRA claim is futile because RFRA only
23 applies to neutral laws of general applicability and there is no law or regulation at issue here.

24 The amended claims are not so obviously devoid of merit as to be utterly futile. Nor is
25 it obvious that the claim against SA Brooks is time-barred and does not relate back to the
26 Amended Complaint. This Court thinks those arguments as to the merits are better addressed

27 ³ The Court puts this in quotes because the parties dispute whether the
28 Proposed Second Amended Complaint states a new claim against SA Brooks or
merely adds additional facts to an already existing claim.

1 in a dispositive motion regarding the Second Amended Complaint where both parties will have
2 adequate opportunity to properly brief the issues. Accordingly, Plaintiff's Motion for Leave to
3 Amend is GRANTED.

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5 **C. Motion to Dismiss and Motion for Summary Judgment by the Individual**
6 **Federal Defendants**

7 Many of the issues and claims in the Second Amended Complaint, especially those
8 regarding TFO Hackett and SA Smith, are unchanged from the Amended Complaint. The
9 new issues include the amended claims as to SA Brooks and the added RFRA claims. Rather
10 than deny the Individual Federal Defendants' Motion to Dismiss and Motion for Summary
11 Judgment as moot and require them to refile the motion, it would be more efficient to keep
12 that motion pending and allow supplemental briefing regarding any new issues or claims
13 surfaced by the Second Amended Complaint. The Court, therefore, orders this supplemental
14 briefing schedule:

- 15 1. Plaintiff shall file its Second Amended Complaint by Friday October 2, 2009.
 - 16 2. The Individual Federal Defendants shall file a Supplemental Brief Regarding their
17 Motion to Dismiss and Motion for Summary Judgment by Friday October 16, 2009.
18 The Supplemental Brief shall be no more than 14 pages.
 - 19 3. Plaintiff shall file a Supplemental Response by Monday November 9, 2009. The
20 Supplemental Response shall be no more than 14 pages.
 - 21 4. If they wish, the Individual Federal Defendants may file a Supplemental Reply by
22 Friday November 13, 2009. The Supplemental Reply shall be no more than 7
23 pages.
 - 24 5. The Individual Federal Defendants' Motion to Dismiss and Motion for Summary
25 Judgment (Dkt. #34) shall be renoted for Friday November 13, 2009.
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1 **III. CONCLUSION**

2 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
3 and the remainder of the record, the Court hereby finds and ORDERS:

4 (1) Plaintiff's Motion for Leave to File Second Amended Complaint (Dkt. #47) is
5 GRANTED.

6 (2) The Individual Federal Defendants' Motion to Dismiss and Motion for Summary
7 Judgment shall be RENOTED for Friday November 13, 2009.

8 (3) The parties shall file supplemental briefs in accordance with the schedule above.

9 (4) The Clerk is directed to forward a copy of this Order to all counsel of record.

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11 DATED this 25th day of September, 2009.

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14 RICARDO S. MARTINEZ
15 UNITED STATES DISTRICT JUDGE
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